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No. 80-791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARTIN BLITSTEIN,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC., AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., Amicus Curiae, by and through Alan Ellis, Co-Chairman of its Amicus Curiae Committee, moves this Court for leave to file a brief as Amicus Curiae in support of the Petition for Certiorari in *Blitstein v. United States*, heretofore filed in this Court, and for grounds would show this Court that: (1) the above Association has a strong and legitimate interest in said

Petition, and (2) that the above Association has submitted a request for consent to the Solicitor General of the United States, but has received no reply as of this date.

WHEREFORE, the Movant prays that this Court grant leave to file a brief in support of the Petition for Certiorari in the above cause.

Respectfully submitted,

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QUESTIONS PRESENTED

This Brief is addressed solely to the questions of:

(1) Whether a trial court should be required: (a) to exercise careful scritiny; and (b) to place the burden of proof upon the prosecution in a case where defense counsel has presented a prima facie case to the effect that his prosecution was the result of a selective and vindictive prosecution against him, and that such prosecutorial vindictiveness was engendered by his prior activities as defense counsel.

(2) Whether evidence concerning other acts of prosecutorial intimidation of defense counsel committed by the same United States Attorney's office are admissible in support of a claim of selective and vindictive prosecution of a defense counsel.

(3) Whether the definition of extortion given by the court below coupled with its refusal to give requested charges which would limit such definition to activities outside of the legitimate practice of criminal law poses a danger to criminal defense counsel in the performance of their duties in our adversary system.

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC., AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers Association, Inc., is a District of Columbia

non-profit organization whose membership is comprised of approximately 1,600 lawyers who are citizens of every state in the union, all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system either as advocates, law professors or judges of the state and federal courts. Among its stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of criminal law, its practices and procedures. Within the general purpose, there is also a specific objective of maintaining a vigorous and independent criminal defense bar which will be able to adequately fulfill its function in our adversary criminal justice system. This Brief is tendered in the discharge of that organizational objective.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

Whether A Trial Court Should Be Required: (A) To Exercise Careful Scrutiny; And (B) To Place The Burden Of Proof Upon The Prosecution In A Case Where Defense Counsel Has Presented A Prima Facie Case To The Effect That His Prosecution Was The Result Of A Selective And Vindictive Prosecution Against Him, And That Such Prosecutorial Vindictiveness Was Engendered By His Prior Activities As Defense Counsel.

A. The Actual Performance of the Trial Court in Disposing of this Issue.

Prior to his trial, the Petitioner herein, Martin Blitstein, filed a *Motion to Dismiss Indictment Based Upon Prosecutorial Misconduct* which alleged a selective and vindictive prosecution, (RI 51-98), and included several exhibits, transcripts, etcetera (RI 63-98). Also filed was a *Proffer of Expected Testimony* dealing with the subject of his *Motion to Dismiss*, (RI 30-35). The Court denied the *Motion* prior to trial, (RI 100). During trial, the Court received some defense testimony on this issue (RIX 410, et seq), and excluded other testimony, (RIX 407, et seq). The excluded testimony dealt with recent attempts by the same United States Attorneys involved here to threaten and intimidate defense counsel so as to interfere with their representation of criminal clients, (see 401 et seq). Including admitted and excluded evidence, the defense submitted a prima facie case to the effect that: (1) there were personal animosities against the Petitioner harbored by the members of the United States Attorney's office, (RIX 434, 443); (2) that these animosities were engendered by Petitioner's representation of a criminal client, (RIX 434, 443); (3) that the United States Attorney's office had previously sought to give expression to these animosities against the Petitioner in an unprecedented contempt action, (RI 63) which was removed to a non-presiding judge when the presiding judge refused to hear it, (RIX 446); (4) that following this attempt, a senior member of the United States Attorney's office threatened Peti-

tioner in Court, (RIX 418); (5) that other criminal defense attorneys in the District of Colorado had been similarly threatened with prosecution and imprisonment by the same United States Attorneys after vigorous defenses of "guilty" clients, (RIX 406);[1] (6) that the initial interview and investigation was conducted by the Assistant United States Attorney who had earlier attempted the contempt action, (RIX 469, 472-473, 482-483); and (7) Petitioner was neither interviewed concerning this matter, nor informed of his "target" status, nor given an opportunity to testify before the grand jury.[2] Later, the Court reaffirmed its decision to deny, (RXI 893). The words of the Court in denying the *Motion* for the second time, revealed: (1) that the Court was placing the entire burden of proof upon the Movant; and (2) that a colorably valid prosecution, i.e., one supported by probable cause, was all that was required to negate a claim of selective and vindictive prosecution of a defense counsel, (RXI 893, et seq). It is the position of the Amicus that the procedures and standards adopted below were not adequate to consider and dispose of a claim of this nature.

B. *The Role, Responsibility, and Liability of a Criminal Defense Lawyer in our Criminal Justice System.*

The role of the criminal defense lawyer in our criminal justice system is that of an effective and vigorous

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1 This evidence was excluded from consideration by the Court as being irrelevant, (RIX 406).

2 9 *United States Attorney's Manual* §9-11.253 (Dept. of Justice August 7, 1978).

adversary in a system where the opponent, the government, has a considerable advantage in manpower and wealth among other things. It is not a particularly easy profession.[3] Although the responsibility of effective representation has always been there, the courts have been developing an evermore strict legal definition, perhaps in response to what is seen as a deficiency in the quality of representation in criminal cases, Erickson AMER. CRIM. L. REV. 233 (fall 1979) at 239-240. Aside from the possible embarrassment and disciplinary actions which can flow from ineffective representations, there is always the possibility of civil liability. While the judiciary, *Pierson v. Ray*, 386 U.S. 547 (1967) and the prosecution, *Imbler v. Pachtman*, 427 U.S. 409 (1976), are cloaked in a mantle of immunity, defense counsel remains out in the cold. Thus, a defense counsel must be effective for a variety of reasons.

This effectiveness is often judged by legal standards; however, one must realize that there is a social value in a defendant feeling that he has had effective representation regardless of the result. A recent study has shown the primary factor of judging defense lawyers is the defendant's view of their lawyer as one who presented a forceful and vigorous defense of his

---

3 As one authority advised beginning criminal lawyers:
Seven out of every ten jury trials result in a conviction. In the Federal Court the percentage is higher. A mistrial or a hung jury is a modest victory. The facts are against you most of the time. The odds are against you all of the time, Owen, *Defending Cases Before Juries* (Prentice-Hall 1973) at 1.

client in the courtroom, or one who "talks up in Court."[4] Of course, a defense counsel who unashamedly presents a forceful defense of his often guilty clients runs the risk of going head to head with a prosecutor. He often may be heartily disliked and even despised by a prosecutor. A prosecutor may feel that society should not permit an unabashed and vigorous defense of a person who not only is considered to be guilty but also a threat to society. We can see this attitude in the excluded testimony below concerning another Colorado defense attorney:

> . . . following the motion to suppress, Mr. Stuckey physically confronted Mr. Worth blocking his course of travel across the courtroom following the Judge's departure from the courtroom; that while physically confronting Mr. Worth and after blocking his travel, Mr. Stuckey said to him the following words, "People like him," referring to his client, "ought to be in prison and people like you who defend him should also be imprisoned, and we have ways of taking care of defense attorneys like you." (RIX 404).

While animosity toward a particular criminal defendant who might have escaped the long arm of the law on

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4 "The lawyering value considered to be most important was 'talks up in court' with a rating of 1.087, indicating that almost *every* inmate considered it very important." O'Brien, Pheterson, Wright and Hostica, AM. J. CRIM. LAW, 283 (Oct. 1977), at 293.

prior occasions might be somewhat unprofessional, it can exist within the criminal justice system. However, personal animosity toward a defense counsel and a belief that he should be "stopped," (RIX 443), runs counter to the interests of our adversary system. The prosecutor's office has wide latitude and discretion in its prosecutors. The prospect of indictment even with subsequent acquittal is synonymous with the specter of financial and reputational ruin. In the view of criminal defense attorneys who value both these values, it is not a sanction to be taken lightly. Thus, personal animosity on the part of a prosecutor which finds vent in a discretionary prosecution which otherwise would not have been brought can be an intimidating and quieting influence on what otherwise would be a more vocal and vigorous defense bar.

Examining the adversary system, we find that there are little or no safeguards against such abuses. While both the prosecutor and the court are shielded by immunity and possessed of great powers to be wielded in the public good, defense counsel can only bargain with the prosecutor, persuade the court, or occasionally prevail before a jury. This Court has held that the prospect of even civil liability much less criminal liability would intimidate a prosecutor and create "an adverse effect upon the functioning of the criminal justice system," *Imbler*, at 426. However, this same opinion recognized "that both the prosecution *and the defense*" needed this freedom from intimidation to perform their respective functions, *Imbler*, at 426. In *Hoar v. Wood*, 44

Mass 193 (1841), Chief Justice Shaw wrote about this need:

> . . . it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights, of their constituents. . . . *Hoar*, at 197-198

However, if this "full freedom" is seen as likely to cause displeasure on the part of opposing counsel and perhaps further result in a prosecution which otherwise might not have been brought, it is questionable whether it will be exercised in the full and vigorous extent necessary to our adversary system. Putting the shoe on the other foot, could the prosecutor effectively exercise this freedom and perform their function within the adversary system if defense counsel possessed the discretion to seek indictments against these same prosecutors? *Imbler* answers this question by holding it would impair the adversary system to burden the prosecution with the prospect of *civil liability* even where he may have utilized perjured testimony or suppressed exculpatory evidence, *Imbler*, at 421, N. 34. Thus, it must be seen that prosecutions or threat of prosecutions emulating from personal animosities against defense counsel pose a danger to the adversary system. Accordingly, Amicus has begun studies which include this problem of selective prosecution against

defense counsel with special emphasis on prosecutions where defense counsel's clients are utilized against him as in this case.[5] However, studies are not solutions and the problem remains.

C. *Reasons why Certiorari Should Be Granted.*

Amicus recognizes that the prosecutor must have the power to prosecute defense counsel; however, it must also be recognized that unlimited prosecutorial discretion without close and careful scrutiny of the courts could do far more harm to the adversary system than that envisioned from mere civil liability in *Imbler*. One of the problems involved in this matter is that there are no standards as to the level of scrutiny or the procedures to be utilized. It is clear that ordinary standards of prosecutorial selectiveness and vindictiveness, see *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), *Blackledge v. Perry*, 417 U.S. 21 (1974) do not perfectly apply themselves to this situation. The danger posed to the ordinary citizen from a prosecutor's personal animosity is rather slight as compared to these who must go toe to toe with this prosecutor on a daily basis. Also, an individual citizen's prosecution, while perhaps an injustice, does not pose a concrete threat to the adversary system. While freedom from prosecution is unthinkable, standards which could protect and insure

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5 See Maloney, *Report on Prosecutorial Misconduct, Natl. Assoc. of Criminal Defense Lawyers*, (August 23, 1980), 10 VOICE FOR THE DEFENSE 7, 8-10 (Aug/Sept. 1980).

the continued independence and effectiveness of the criminal bar are both thinkable and needed. Such standards do not exist and the trial court's handling of this matter is evidence of this lack. The Amicus would suggest that this lack of applicable standards represents the most compelling reason for the granting of a Writ of Certiorari.

D. Standards Applicable to Prima Facie Claims of Prosecutorial Selectiveness and Vindictiveness.

When a prima facie case of prosecutorial selectiveness and vindictiveness against a criminal defense counsel is presented, the trial court (1) should be required to exercise close scrutiny on the matter, and (2) should place the burden of proof upon the government. Considering the small number of these prosecutions and the smaller number wherein a prima facie case could be made, this would work no great hardship upon the prosecution. Indeed, considering the other side of the coin, the damage which might be done to the adversary system by unsupervised and unchecked prosecutions of defense counsel, the cost would be slight. The courts have promised to safeguard the criminal defense bar from attempts to stifle their advocacy, *Sacher v. United States,* 343 U.S. 1 (1952), at 13. It is this supervision to safeguard the adversary system that is requested herein.

II.

Whether Evidence Concerning Other Acts Of Prosecutorial Intimidation Of Defense Counsel Committed By The Same United States Attorney's Office Are Admissible In Support Of A Claim Of Selective And Vindictive Prosecution Of A Defense Counsel.

The trial court only allowed the Petitioner to present evidence of his own plight and refused to accept evidence of the plight of other defense counsel, (RIX 406). Worse than a single abuse of prosecutorial discretion in intimidating defense counsel would be a campaign to intimidate defense counsel in general. Under the court's ruling below, evidence of this grave situation could never be presented. Again, the lack of applicable standards calls for this Court's resolution. Again, the court's prior promises to safeguard the criminal defense bar are invoked.

III.

Whether The Definition Of Extortion Given By The Court Below Coupled With Its Refusal To Give Requested Charges Which Would Limit Such Definition To Activities Outside Of The Legitimate Practice Of Criminal Law Poses A Danger To Criminal Defense Counsel In The Performance Of Their Duties In Our Adversary System.

At trial, the court instructed the jury as to extortion:

> It will be your duty to determine as a question of fact as to whether or not the defendant knowingly and intentionally utilized an actual fear within Clifford T. DeYoung with the specific intent of inducing DeYoung to part with his money or property, and when I say an actual fear, I mean a present and reasonable fear.
>
> The law requires proof beyond a reasonable doubt that the fear was reasonable and actual and that the defendant knew of and intentionally used the actual fear because the law does not hold any man responsible for the unforseeable or the unreasonable actions of those with whom he speaks or deals, but the law does prohibit knowing and intentional use of an existing fear when this is done with the specific purpose of inducing another to part with his money or property. RXII 929

Defense counsel at trial requested instructions which would limit the application of this general definition so as to make it inapplicable to the legitimate practice of criminal law:

> The statute under which the charges are based has no reference or bearing on action by an attorney, honorestly [sic] acting and representing clients. It has reference to and bears on interference with interstate commerce by

> the compulsory payment of money extorted by a person for his own individual benefit. Sup RI 3
>
> You are instructed that with respect to the charges contained in the indictment, the specific amount of attorney fees either charged or received is not relevant. Sup RI 6

This instruction is similar to the instruction concerning legitimate labor activities utilized by many courts:

> The statute under which the charges are based has no reference or bearing on action by a labor organization leader, honestly acting and representing members of his organization. It has reference to and bears on interference with interstate commerce by the compulsory payment of money extorted by a labor leader for his own individual benefit. 2 Devitt and Blackmar §56.10

The above instruction was necessitated by the fact that some labor activities such as strikes and threatened strikes fell under the global definition of extortion even though Congress did not intend these activities to be criminalized, *United States v. Enmons*, 410 U.S. 376 (1973). Thus, the limiting instruction was composed to follow the congressional intent. Can it be said that it was the will and intent to criminalize the conduct of criminal defense counsel who utilize an existing fear of punishment in their client to gain payment of their fee?

Unfortunately the realities of criminal practice are that the fear of punishment and the loss of legal representation are major factors motivating clients to pay their fees. Were this practice illegal, it would place a defense counsel in an intolerable position, striving to collect his fee while studiously avoiding any mention of the seriousness of the crime, the possible punishments, the need for legal representation, his possible withdrawal if the fee was not forthcoming. Indeed, a motion to withdraw because of non-payment of fees could be seen as an attempt to extort. Surely there must be some limitation of the application of this general definition of extortion to criminal defense counsel or else there should be a frank warning to the criminal defense bar.

PRAYER

WHEREFORE, the above premises considered, the Amicus Curiae prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Amicus Curiae hereby certifies as follows:

(a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Motion for Leave to File Brief as Amicus Curiae and Brief of the National Association of Criminal Defense Lawyers, Inc., Amicus Curiae, in Support of the Petition for Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Joseph Dolan
United States Attorney
Room C330

United States Courthouse
Drawer 3615
Denver, Colorado 80294

(c) That on this day I served three printed copies of the foregoing Motion for Leave to File Brief of Amicus Curiae and Brief of the National Association of Criminal Defense Lawyers, Inc., Amicus Curiae, in Support of the Petition for Certiorari on the said Wade H. McCree, Jr., and the said Joseph Dolan, attorneys for the said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

Executed this ____ day of December, 1980.

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